

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED

SEP 07 2006

Michael N. Milby, Clerk

OSCAR WYATT, et al.,

Plaintiffs,

vs.

EL PASO CORP., et al.,

Defendants.

NO. H-02-2717

JURY

GRUNET REALTY CORP., derivatively
and on behalf of
EL PASO CORPORATION,

Plaintiff,

v.

NO. H-02-3161

MOTION TO DISMISS

WILLIAM A. WISE, BYRON
ALLUMBAUGH, JOHN M. BISSELL,
JUAN CARLOS BRANIFF, JAMES F.
GIBBONS, ANTHONY W. HALL, JR.,
RONALD L. KUEHN, JR.,
J. CARLETON MacNEIL, JR.,
THOMAS R. McDADE, MALCOLM
WALLOP, JOE B. WYATT and
D. DWIGHT SCOTT,

Defendants

-and-

EL PASO CORPORATION,

Nominal Defendant.

Defendants in the above referenced case file this motion to dismiss, asking the Court to
dismiss the above-referenced case, H-02-3161, styled *Grunet Realty Corp. v. El Paso Corp., et*

al. (“*Grunet Action*”), with prejudice based on the doctrines of res judicata and settlement and release. All claims and actions asserted in the *Grunet Action* are covered by a settlement and final judgment in the related state court action, *Gebhardt v. Allumbaugh*, Cause No. 2002-13602, In the District Court of Harris County, Texas, 295th Judicial District (“*Gebhardt*”).

I.

The *Grunet Action*, is a derivative case filed on August 22, 2002 and consolidated into the main securities action (“*Wyatt*”) on September 25, 2002. In its complaint, the plaintiff, Grunet Realty Corporation, asserted various claims on behalf of El Paso Corporation against certain of El Paso’s officers and directors (“Defendants”). Plaintiffs based their claims on the Defendants’ alleged actions related to the California energy market, round-trip trading, mark-to-market accounting of restructured energy contracts and off-balance-sheet debt. *See* Ex. A (*Grunet Complaint*), at ¶¶ 2, 29-40. Several other derivative cases asserting some or all of these claims were also filed by shareholders on behalf of El Paso Corporation. *Gebhardt* was the first-filed of these cases.

The *Gebhardt* case settled earlier this year. *See* Ex. C, at Exhibit 1 (Gebhardt Stipulation of Settlement, attached to Plaintiffs’ Unopposed Motion For Preliminary Approval of Proposed Settlement). After providing notice to El Paso’s shareholders, the state court overseeing the *Gebhardt* action approved the settlement and entered a final judgment on June 26, 2006. *See* Ex. D. The time for filing an appeal of that judgment expired on July 26, 2006 and the time for filing a motion to extend the appeal deadline expired on August 10, 2006. Neither a notice of appeal nor a motion to extend the time to appeal has been filed. The *Gebhardt* judgment is now final.

The *Gebhardt* case included the same claims, the same defendants and the same real plaintiff in interest involved in this *Grunet Action*. See Ex. B (*Gebhardt* Fifth Amended Petition). The settlement in *Gebhardt* clearly released the claims brought by Grunet Realty in this case, and the judgment in *Gebhardt* dismissed these claims with prejudice. Grunet Realty did not intervene in the *Gebhardt* case and did not attempt to challenge the settlement. With the exception of the *Grunet Action*, all other derivative cases relating to the issues and claims settled in *Gebhardt* were either consolidated into *Gebhardt* or have been dismissed.

Because the claims and parties in this case completely overlap with the claims settled and subject to a final judgment in *Gebhardt*, the Court should dismiss this case with prejudice based on the doctrine of res judicata. See *Smith v. Waste Management, Inc.*, 407 F. 3d 381, 386 (5th Cir. 2005). The claims in this case should also be dismissed based on the doctrine of settlement and release, as they have been fully and finally settled and released pursuant to the Stipulation of Settlement in *Gebhardt*. See Ex. C, §§ 1.27, 8.1.

All of the parties in this case, other than the derivative plaintiff, were parties to the *Gebhardt* action and were parties to the settlement which released the claims brought in this case. See Ex. A (*Grunet* Complaint); Ex. B (*Gebhardt* Complaint); Ex. C, at Exhibit 1 (settlement), at § 1.5. The *Gebhardt* release covers, in part:

All claims . . . that were asserted or could have been asserted by El Paso Stockholders (including but not limited to Derivative Plaintiffs) on behalf of El Paso or by El Paso against the Settling Derivative Defendants (or any of them), or against the Board in the Action, that are based upon or related in any way to the facts, circumstances, transactions, events, occurrences, disclosures, statements, omissions, acts, or failures to act which were alleged or could have been alleged in the Action.

See *id.*, § 1.27.

The claims asserted on behalf of El Paso in this case were brought or could have been brought in the *Gebhardt* case. Indeed, each of the primary allegations in this case – California market manipulation, round-trip trading, mark-to-market accounting related to restructured energy contracts and off-balance-sheet debt – is expressly described in the *Gebhardt* Fifth Amended Petition and in the Stipulation of Settlement. See Ex. B, ¶¶ 36-101 (California market manipulation), ¶¶ 102-119 (round-trip trading), ¶¶ 120-134 (restructuring of energy contracts), ¶¶ 135-137 (off-balance-sheet debt); Ex. C, at Exhibit 1, page 10 (California market manipulation), 13 (remaining allegations). The Court should, therefore, dismiss this case based on res judicata and based on the doctrine of settlement and release.

III. PRAYER

For the foregoing reasons, Defendants ask this court to dismiss the *Grunet Action* with prejudice. Defendant Wise is not a signatory to this motion but his counsel has indicated he will join this motion by filing a subsequent pleading.

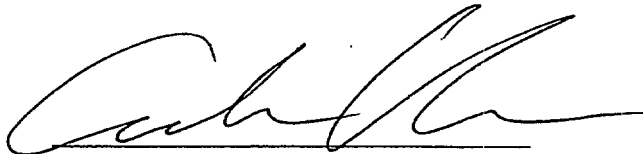
Respectfully submitted,



Stephen D. Susman
State Bar No. 19521000
S.D. Admissions No. 03257
SUSMAN GODFREY L.L.P.
1000 Louisiana Street, Suite 5100
Houston, Texas 77002-5096
Telephone: (713) 651-9366
Fax: (713) 654-6666
Attorney-in-Charge for Defendant
El Paso Corporation

OF COUNSEL:

Mark L. D. Wawro
State Bar No. 20988275
S.D. Admissions No. 06393
Mary Kathryn Sammons
State Bar No. 17556100
S.D. Admissions No. 10657
Karen A. Oshman
State Bar No. 15335800
S.D. Admissions No. 07724
Joseph S. Grinstein
State Bar No. 24002188
S.D. Admissions No. 22831
William R. H. Merrill
State Bar No. 24006064
S.D. Admissions No. 23601
SUSMAN GODFREY L.L.P.
1000 Louisiana Street, Suite 5100
Houston, Texas 77002-5096
Telephone: (713) 651-9366
Fax: (713) 654-6666



J. Clifford Gunter III
State Bar No. 08627000
S.D. Admissions No. 533
Bracewell & Giuliani, L.L.P.
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781
Telephone: (713) 223-2300
Fax: (713) 221-1212
Attorney-in-Charge for Defendants
Byron Allumbaugh, John M. Bissell, Juan
Carlos Braniff, James F. Gibbons, Anthony W.
Hall, Jr., J. Carleton MacNeil, Jr., Thomas R.
McDade and Malcolm Wallop

Of Counsel:

Andrew M. Edison
State Bar No. 00790629
S. D. Admissions No. 18207
Bracewell & Giuliani, L.L.P.
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781
Telephone: (713) 223-2300
Fax: (713) 221-1212

Charles Reed *w/ permission dd*
Charles Reed
Admitted Pro Hac Vice
Hughes Hubbard & Reed LLP
1775 I Street, N.W.
Washington, D.C. 20006-2401
Telephone: (202) 721-4639
Fax: (202) 721-4646
Attorney-in-Charge for Defendant
Ronald L. Kuehn, Jr.

Of Counsel:
Kevin T. Abikoff
State Bar No. 24034118
S.D. Admissions No. 34731
Hughes Hubbard & Reed LLP
1775 I Street, N.W.
Washington, DC 20006
Telephone: (202) 721-4600
Fax: (202) 721-4646

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **MOTION TO DISMISS** was served under Rule 5,
Federal Rules of Civil Procedure, on September 7, 2006, upon the following counsel of record:

Mr. Jeffrey S. Abraham (**By First-Class Mail**)
Mr. Lawrence D. Levit
Abraham & Associates
One Penn Plaza, Suite 1910
New York, NY 10119
Attorneys for Plaintiff

Mr. G. Sean Jez (**By First-Class Mail**)
George M. Fleming
Fleming & Associates
1330 Post Oak Blvd., Suite 3030
Houston, TX 77056-3019
Attorneys for Plaintiff

Mr. Jonathan M. Plasse (*By First-Class Mail*)

Ms. Barbara J. Hart

Mr. Louis Gottlieb

Ms. Lisa Buckser-Schulz

Labaton Sucharow & Rudoff LLP

100 Park Avenue

New York, NY 10017-5563

Lead Counsel and Attorneys for Oscar S. Wyatt, Jr.

Mr. Andy Tindel (*By First-Class Mail*)

Provost Umphrey Law Firm, L.L.P.

112 East Line Street, Suite 304

Tyler, TX 75702

Local Counsel for Oscar S. Wyatt, Jr.

Mr. Alan Schulman (*By First-Class Mail*)

Mr. David Stickney

Bernstein Litowitz Berger & Grossmann LLP

12481 High Bluff Drive, Suite 300

San Diego, CA 92130

Deputy Lead Counsel and Attorneys for Jacksonville Police & Fire Pension Fund

Mr. Jacks C. Nickens (*By First-Class Mail*)

Mr. Richard P. Keeton

Mr. Paul D. Flack

Nickens, Keeton, Lawless, Farrell & Flack, LLP

600 Travis Street, Suite 7500

Houston, TX 77002

Local Counsel for Jacksonville Police & Fire Pension Fund

Mr. Michael J. Pucillo (*By First-Class Mail*)

Berman, DeValerio, Pease, Tabacco, Burt & Pucillo

222 Lakeview Avenue, Suite 900

West Palm Beach, Florida 33401

Deputy Counsel and Attorneys for Oklahoma Firefighters Pension & Retirement System

Mr. Roger B. Greenberg (*By First-Class Mail*)

Schwartz, Junell, Greenberg & Oathout, L.L.P.

909 Fannin Street, Suite 2700

Houston, TX 77010

Local Counsel for Oklahoma Firefighters Pension & Retirement System

Mr. Richard N. Carrell (*By First-Class Mail*)

Ms. Jane Dowell

Fulbright & Jaworski L.L.P.

1301 McKinney Street, Suite 5100

Houston, TX 77010-3095

Attorneys for PricewaterhouseCoopers

Mr. Joel M. Androphy (*By First-Class Mail*)

Berg & Androphy

3704 Travis Street

Houston, TX 77002

Attorneys for Credit Suisse Securities (USA) LLC

Mr. Richard W. Clary (*By First-Class Mail*)

Ms. Julie A. North

Cravath, Swaine & Moore

825 Eighth Avenue

New York, NY 10019

Attorneys for Credit Suisse Securities (USA) LLC

Mr. Larry R. Veselka (*By First-Class Mail*)

Ms. Kristin E. Adler

Smyser Kaplan & Veselka, L.L.P.

700 Louisiana Street, Suite 2300

Houston, TX 77002

Attorneys for Rodney D. Erskine

Ms. Alison Smith (*By First-Class Mail*)

Haynes and Boone, L.L.P.

1221 McKinney Street, Suite 2100

Houston, TX 77010-2007

Attorneys for Brent Austin and in derivative cases, Dwight Scott

Mr. David Beck (*By First-Class Mail*)

Beck, Redden & Secrest, L.L.P.

1221 McKinney Street, Suite 4500

Houston, TX 77010-2010

Attorneys for William Wise

Mr. Robin C. Gibbs (*By First-Class Mail*)

Ms. Caren Sweetland

Gibbs & Bruns, L.L.P.

1100 Louisiana Street, Suite 5300

Houston, TX 77002

Attorneys for Ralph Eads

Mr. Kevin Abikoff (*By First-Class Mail*)

Mr. Charles Reed

Hughes Hubbard & Reed LLP

1775 I Street, N.W.

Washington, D.C. 20006-2401

Attorneys for Ronald L. Kuehn, Jr.

Mr. Jonathan L. Sulds (*By First-Class Mail*)

Akin Gump Strauss Hauer & Feld L.L.P.

590 Madison Avenue

New York, NY 10022-2524

Attorneys for Committee of El Paso Corporation's Retirement Savings Plan

Mr. Laurence K. Gustafson (*By First-Class Mail*)

Haynes and Boone, L.L.P.

901 Main Street, Suite 3100

Dallas, TX 75202-3789

Attorneys for El Paso Audit Committee

Mr. J. Clifford Gunter III (*By First-Class Mail*)

Mr. Andrew M. Edison

Bracewell & Giuliani, L.L.P.

711 Louisiana Street, Suite 2900

Houston, TX 77002-2781

*Attorneys for Byron Allumbaugh, John M. Bissell,
Juan Carlos Braniff, James F. Gibbons, Anthony W.
Hall, Jr., J. Carleton MacNeil, Jr., Thomas R. McDade
and Malcolm Wallop*

William R. H. Merrill
William R. H. Merrill *dd*